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October Term, 1967

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No. 430

G. I. DISTRIBUTORS, INC.,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OSMOND K. FRAENKEL,
Attorney for Petitioner.

40 Returns

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
How Federal Questions Were Presented	5
Reasons for Granting the Writ	6
APPENDIX:	
Opinion of Appellate Term, Second Department	15
Opinions of Court of Appeals	18
Order of Court of Appeals Denying Motion for Reargument and Granting Motion Amending Remittitur	24

Cases Cited

Alberts v. California (Roth v. United States, 354 U.S. 476	6, 7
Baumgartner v. United States, 322 U.S. 665	11
Cole v. Arkansas, 333 U.S. 196	6
DeJonge v. Oregon, 229 U.S. 353	6
Garner v. Louisiana, 368 U.S. 157	9

PAGE

Gonzales v. Landon, 350 U.S. 920 11

Hartzel v. United States, 322 U.S. 680 11

In re Oliver, 333 U.S. 257 10

Jacobellis v. Ohio, 378 U.S. 184 8

Larkin v. G. I. Distributors, 14 N.Y. 2d 869 12

Manual Enterprises, Inc. v. Day, 370 U.S. 478 ..... 7, 11

New York Times Co., et al. v. Sullivan, 376 U.S. 254 11

One, Inc. v. Olesen, 355 U.S. 361 12

People v. Smith (Smith v. California), App. Dept. Calif. Superior Court, No. CR A-5113, cert. granted 373 U.S. 901, judgment vacated and cases remanded to state court, 375 U.S. 259 9

Redrup v. New York, 386 U.S. 767 12

Smith v. California, 361 U.S. 147 10

Speiser v. Randall, 357 U.S. 513 6

State v. Jacobellis, 115 Ohio App. 226, 175 N.E. 2d 123 (1961), aff'd 173 Ohio St. 22, 179 N.E. 2d 777, rev'd 378 U. S. 184 9

State v. Locks, 397 P. 2d 949 10

Thompson v. City of Louisville, 362 U.S. 199 6

United States v. Klaw, 350 F. 2d 155 12

Weiman v. Updegraff, 344 U.S. 183 8

Other Authorities Cited

New York Code of Criminal Procedure, Sec. 22(a) .. 12

New York Penal Law, Sec. 1141 3

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October Term, 1967

No.

G. I. DISTRIBUTORS, INC.,

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vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner, G. I. Distributors, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered June 1, 1967.

Opinions Below

The action was tried in the Criminal Court of the City of New York, County of Queens. No opinion was delivered by the three judge court before whom the action was tried (R. 24) or by the Appellate Term for the Second Department in affirming (R. 32). But there was a dissenting opinion (R. 32) that has not been officially reported. A copy is annexed, *infra,* pages 15-17. The opinions of the Court of Appeals have not been officially reported. Copies are annexed at pages 18-23, *infra.*

Jurisdiction

The judgment of the Court of Appeals was rendered June 1, 1967. Thereafter a timely application was made for rehearing which was denied on July 7, 1967 but an application for amendment of the Court's remittitur to indicate what constitutional issues had been raised was granted. A copy of that order is set forth at pages 24, 25, *infra*.

Questions Presented

1. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, an accused in a State obscenity prosecution, as the petitioner herein, can be convicted without any proof in the record that the magazine involved exceeds the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity.

2. Whether, in the light of the requirements of due process of law under the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, the State's failure to bear the burden of proving in the obscenity prosecution herein that the magazine involved exceeds the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity, invalidates the judgment of conviction rendered against petitioner.

3. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a State may regard the trier of fact in a local obscenity prosecution as the embodiment of national community standards, competent to judge a challenged magazine against those standard, without any evidence in the

record, as in the case herein, to establish that the magazine exceeds contemporary community standards, or appeals to prurient interest or is utterly without social importance.

4. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law.

5. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, the magazine involved in the prosecution herein upon which a judgment of conviction was rendered is entitled to constitutional protection.

Constitutional and Statutory Provisions Involved

New York Penal Law § 1141 provides, so far as here relevant:

> "1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, . . . or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine . . .
>
> "Is guilty of a misdemeanor . . ."

The constitutional provision applicable is the due process clause of the Fourteenth Amendment.

Statement of the Case

The information charging a violation of Penal Law § 1141 did not originally specify what the material consisted of (R. 6). But it was, without objection, amended to refer to the magazine "Grecian Guild Studio Quarterly," No. 15, and two paperback books, "Gay Reunion" and "The Innocent Lesbian" (R. 10).

The book "Gay Reunion" was dropped from the case because of absence of proof of possession of any copies by defendant (R. 15). Defendant was acquitted as to the other book, "The Innocent Lesbian," but convicted as to the magazine, "Grecian Guild Studio Quarterly" (R. 24). It was fined $250 (R. 24) and the fine paid.

At the trial a police officer testified that, having obtained a search warrant, he spoke with Irving Herman, the president of defendant (R. 12) and asked him about pornographic material. Herman answered that they had none, and, when shown the material named in the warrant, said that it was not pornographic (R. 12). At that time he looked at the covers of the two books (R. 14). After testimony with regard to the number of copies fou d of "Grecian Guild Studio Quarterly" and "The Innocent Lesbian" (R. 14), the People rested (R. 14).

Defendant's counsel then moved to dismiss as to "Gay Reunion" and that was granted, as already noted (R. 15). With respect to the other material the motion rested in part on the failure of the People to offer any proof as to community standards (R. 15), in part on the failure of proof as to scienter (R. 16), and in part on the ground that the material was not obscene (R. 16). Decision was then reserved (R. 17).

Defendant's case consisted of offers of material distributed by it which had been declared not obscene in earlier litigation to which defendant had been a party (R. 18). These offers related only to the issue of scienter (R. 18) but they were rejected (R. 19). The material then offered which

relates to the magazine was a so-called "girlie" magazine, "Tonight, No. 5"—marked Defendant's Exhibit A for Identification (R. 19). That, as stated to the Court below, was one of the magazines included in the case of *Larkin* v. *G. I. Distributors, Inc.*, 14 N. Y. 2d 869, and there held not to be obscene (R. 18).

Defendant then rested, renewed the earlier motions, and moved for acquittal for failure to prove guilt beyond a reasonable doubt (R. 20). Decision was reserved and the motions disposed of as already indicated (R. 20).

The conviction was affirmed without opinion by the Appellate Term for the Second Department, Mr. Justice Gulotta dissenting in an opinion (R. 31). That opinion in part dealt with the issue of proof of community standards, but not in the way that issue had been presented at the trial. Mr. Justice Gulotta also expressed the view that the trial court should have received Exhibit A for Identification.

In the Court of Appeals the opinions dealt only with the issue of obscenity (see *infra*, pp. 18-23).

How Federal Questions Were Presented

At the end of the People's case defendant's counsel moved to dismiss on the ground that, under decisions of this Court, it was necessary to establish community standards and that this had not been done (R. 15); that there was no proof of scienter (R. 16), and that, under the standards laid down by this Court the challenged material was not obscene (R. 16). These motions were renewed at the end of the entire case (R. 20).

These points were all presented to the New York Court of Appeals as it recognized in the order amending the remittitur. This set forth the federal constitutional issues as follows:

"Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether defendant-appellant's rights under the due process clause of the Fourteenth Amendment were violated. Defendant argued that the material upon which the prosecution was based was not obscene, that there was a burden upon the People to produce evidence of contemporary community standards, and that it was necessary for the prosecution to prove that defendant had reason to believe that the material violated the law. The Court of Appeals held that the constitutional rights of defendant-appellant had not been violated."

Reasons for Granting the Writ

Due process of law in any case includes the presumption of innocence and imposes upon the prosecution the burden of proving the existence of every element necessary to constitute the crime charged. Particularly "where the transcendent value of speech is involved", due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". *Speiser* v. *Randall,* 357 U.S. 513, 526.

Unless the burden of proof in obscenity prosecutions is meticulously maintained, constitutionally protected material may be suppressed, and individuals involved in their circulation punished, under unproved charges. The right to be heard before condemnation is hardly meaningful if the accuser is relieved of the burden of proving his accusation. Plainly, if it is a sheer denial of due process to convict a person upon a charge not made, or a charge not tried, it is equally arbitrary to rest a conviction upon a charge not proved. *DeJonge* v. *Oregon,* 299 U.S. 353, 362; *Cole* v. *Arkansas,* 333 U.S. 196, 201; *Thompson* v. *City of Louisville,* 362 U.S. 199, 206.

In *Alberts* v. *California (Roth* v. *United States),* 354 U.S. 476, this Court held that the safeguards necessary for

securing the freedoms of speech and press for material not obscene required the following standard for judging the obscenity of a writing—whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

The Court's opinion in *Roth-Alberts* further indicated that the newly formulated standard for judging obscenity was similar to the definition of obscenity formulated by the American Law Institute, to wit: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 354 U.S. 487, n.20.

Roth-Alberts would appear, therefore, to have made plain that one essential element of the crime of obscenity, in both State and Federal jurisdictions, is the extent to which the writing in question substantially exceeds contemporary community standards, *i.e.*, the limits of candor in depiction or representation of sex, nudity or excretion. Indeed, in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, it was noted that the proposed Official Draft of the American Law Institute defined obscenity as material which, if "'considered as a whole, its predominant appeal is to prurient interest . . . and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters'". 370 U.S. at 486. Mr. Justice Harlan stated: "Obscenity under the federal statute thus *requires proof of two distinct elements:* (1) patent offensiveness; and (2) 'prurient interest' appeal", 370 U.S. at 486 (emphasis supplied).

A review of the decided cases, therefore, appears to make plain that the burden of proving in any obscenity prosecution the limits of candor in the Nation as a whole

rests upon the prosecution as a requirement of due process. Without such evidence in the record, it is obvious that no finding can be made that the material "goes substantially beyond customary limits of candor in description or representation of such matters". *Jacobellis* v. *Ohio,* 378 U.S. 184, 191.

In the case herein, there is absolutely no evidence in the record to support the conclusion that the magazine involved substantially exceed the limits of candor in the Nation as a whole. Nor is there any mystery as to what occurred at the trial level: The prosecutor handed the magazine to the court; the court examined it; the court found it "obscene". The State has suppressed a magazine, and placed the stigma of criminality upon its distributor, without proof that the books are outside the area of constitutional protection for freedom of expression.

Protection for non-obscene writings can only be assured if the burden is placed upon the prosecution to prove by sufficient evidence that the limits of candor have been exceeded in particular cases. *Cf., Weiman* v. *Updegraff,* 344 U.S. 183, 191. The limits of candor in the Nation as a whole at a given time cannot be a matter of "judicial notice". There can be no assumption in reason that any particular trier of facts in a particular local community knows, without evidence, what is the customary freedom of expression in the Nation as a whole with respect to sex and sex relations in the various media of communication, such as books, magazines, the motion pictures, the theatre, television, and in such fields of exploration as literature, art, science, physiology, psychology and other related areas. The limits of candor in the United States with respect to the depiction and representation of sex and nudity are not a matter of common and general knowledge, well established and authoritatively settled. So long as the belief existed that local standards were the criterion there may have been some argument for the position that the trial

judge might take judicial notice of the standards of his own community. But now that this Court has held, in *Jacobellis, supra*, that it is national standards that must govern, it would be irrational to suppose that judges in the inferior criminal courts all over the country possess the background or knowledge sufficient for an informed judgment on the subject.

The power of "judicial notice" is, as to matters involving First Amendment protections, one to be used with great caution, and if there is the slighest doubt as to the facts or common knowledge of the facts, evidence should be required. "To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial'." *Garner* v. *Louisiana*, 368 U.S. 157, 173. The basis for appellate review and constitutional judgment is undermined "where the evidence is unknown". *Id.*, at 173.

There is no undue hardship placed upon the prosecution in requiring the State to prove the limits of candor and the extent to which the writing in question exceeds such limits. Prosecutors have successfully assumed the burden at the trial level in a number of obscenity prosecutions. *State* v. *Jacobellis*, 115 Ohio App. 226, 175 N.E. 2d 123 (1961), aff'd 173 Ohio St. 22, 179 N.E. 2d 777, rev'd 378 U.S. 184; *People* v. *Smith* (*Smith* v. *California*), App. Dept. Calif. Superior Court, No. CR A-5113, affirming judgment of conviction after jury trial and expert testimony offered on behalf of prosecution involving sale of *Tropic of Cancer*, cert. granted 373 U.S. 901, judgment vacated and case remanded to state court, 375 U.S. 259.

The judgment of conviction as obtained here constitutes a broad departure from any specific constitutional guarantees, including the due process guarantees "representing fundamental ideas of fair play and justice in civilized

society". *In re Oliver*, 333 U.S. 257, 282. The question involved is of substantial importance to the community in general, and it is bound to arise in every obscenity prosecution. It should, it is submitted, be determined by this Court.

2. It is also submitted that the standard of proof required under the Constitution in obscenity prosecutions has not been satisfied in this case with respect to the issue of *scienter*. This Court held in *Smith* v. *California*, 361 U.S. 147, that the strict liability feature of the California ordinance there involved would seriously restrict the circulation of books which are not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold". 361 U.S. at 152. The tendency of the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any scienter on his part regarding the book's obscenity". 361 U.S. at 160.

In view of the ruling in *Smith* v. *California*, and constitutional principles implicated therein, courts have required the prosecution to plead and prove that the accused knew that the material was obscene. In *State* v. *Locks*, 397 P. 2d 949, the Arizona Supreme Court invalidated the state's obscenity law as unconstitutionally vague, and held that an accused "cannot be found guilty unless he had knowledge of the obscene or indecent nature of the material which it is contended he was keeping for sale and exhibiting". 397 P. 2d at 951. Noting that the words "obscene or indecent", without statutory definition, are words of "varied meaning, varying in definition from case to case" (397 P. 2d at 951), the Arizona Supreme Court stated "it is obvious that a layman would have nothing but difficulty and confusion in his mind were he to attempt to work out his own definition of the words 'obscene or indecent' as used in A.R.S. 13-532" (397 P. 2d at 952).

If the constitutional standard relative to *scienter* is to be maintained, plainly the proof in the record must be of "convincing clarity" to satisfy the demands of such standard. *New York Times Co., et al.* v. *Sullivan*, 376 U.S. 254, 284-286. See also, *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 491-495. For in the free speech and free press areas, it is essential that those alleged to be engaged in "criminal speech" shall not be condemned without "clear, convincing and unequivocal" proof of specific unlawful knowledge and intent. Such proof must be "solid". There must be "that solidity of proof which leaves no troubling doubt in deciding a question of such gravity" as is implied in an attempt to make punishable a mental state in a context of constitutionally protected freedoms. *Baumgartner* v. *United States*, 322 U.S. 665, 670. See also, *Hartzel* v. *United States*, 322 U.S. 680, 686-687; *Gonzales* v. *Landon*, 350 U.S. 920. "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co., et al.* v. *Sullivan*, 376 U.S. 254, 285.

It is submitted that the proof adduced in the record herein was totally inadequate to satisfy the state's constitutional burden of proof on the issue of *scienter*.

There was no testimony in this case that anyone connected with petitioner had reason to believe that the material was obscene. The only witness produced by the State was the arresting officer who testified to a conversation with petitioner's president, Irving Herman, and advised him that he had a search warrant for certain books supposed to be pornographic. Herman looked at the books and answered that they were not pornographic (R. 12). That is the entire record on the subject.

This Court has been concerned with the question of scienter in a number of situations. Indeed, in *Redrup* v.

New York, 386 U.S. 767, and its companion *Austin* case, the Court originally granted certiorari only on the issue of scienter but finally decided the cases on the basis that the materials involved were not obscene.

The question is scienter is again involved in the case of *Rabeck* v. *New York* in which an appeal to this Court has been taken and the Jurisdictional Statement will shortly be filed. The question is bound to recur. It is important, therefore, that this Court clarify the law by indicating what kind of evidence would be sufficient to justify an inference of knowledge of the character of material involved.

In this connection we submit also that it is essential for the prosecution to show not only that the accused knew what kind of material was involved but also that he had reason to believe the material violated the law.

Particularly is this true in New York where the statute, New York Code of Criminal Procedure, § 22(a), provides for injunctive relief against the distribution of material deemed obscene. That was the procedure used in *Larkin* v. *G. I. Distributors,* 14 N.Y.2d 869. Obviously, if after a finding of obscenity any material involved in that proceeding were sold, there would be sufficient basis for finding that the seller had knowledge that the material violated the law. Otherwise, in this delicate field of First Amendment rights the fear of prosecution in connection with material that is in any way doubtful is bound to have a deterrent effect. The question is important and should, therefore, be reviewed by this Court.

3. We do not see how the finding of obscenity in the case at bar can stand in view of this Court's decisions in *Redrup, supra,* and the dozen or so cases decided on June 12, 1967. Moreover, the question of the extent to which material appealing to homosexuals is protected should be settled by this Court. (*Cf. One, Inc.* v. *Olesen,* 355 U.S. 361; *United States* v. *Klaw,* 350 F.2d 155.)

We believe, therefore, that there are important constitutional issues involved here which have not been, but should be, resolved by this Court.

Respectfully submitted,

OSMOND K. FRAENKEL,
Attorney for Petitioner.

APPENDIX

Opinion of Appellate Term, Second Department

By DiGiovanna, Gulotta and Baker, *JJ.*

Judgment of conviction affirmed. No opinion.

DiGiovanna and Baker, JJ., concur.

Gulotta, J., dissents and votes to reverse with the following memorandum:

I dissent from the affirmance of the conviction herein. In my opinion it was error both to exclude testimony of contemporary community standards and, secondly, to exclude the proffered proof of defendant's familiarity with other books which had previously withstood court test, and upon which defendant relied in arriving at his decision to include the instant book in his stock.

The former was relevant on the basic issue of obscenity and the latter on the issue of scienter.

In People v. Richmond County News (9 N. Y. 2d 578, at page 586) the court said:

"Mindful of the constitutional necessity to open the door barring state intrusion into this area, 'only the slightest crack necessary' (Roth v. United States, 354 U. S. 476, 488, supra), and desirous of erecting a standard which embodies the most universal moral sensibilities and may be applied objectively, we are of the opinion that the prohibitions of section 1141 of the Penal Law should apply only to what may properly be termed 'hard-core pornography.'"

Since this case settles that the statute can and does only deal with hard-core pornography, I think it too sweeping a conclusion to hold that People v. Finkelstein (11 N. Y. 2d 300) bars proof of community standards in hard-core cases, since that is the only type that can be prosecuted. While a trial judge may decide that material is so manifestly obscene that the People have made out a case without proof of community standards, he should not refuse a proffer of such proof by defendant on the theory that the issue is closed because of his personal opinion.

It seems to me that the correct approach is set forth in Judge Van Vorhees' concurring opinion, page 307:

"In ascertaining what are contemporary community standards, I agree with Judge Dye that other books and publications may be compared which are currently sold by bookstores to the public. This aspect was considered in Smith v. California (361 U. S. 147) in the concurring opinions of Justices Frankfurter and Harlan. Justice Frankfurter stated:

'Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity (Roth v. United States, 354 U. S. 476, 489), it surely must be rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. *Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror and judge* * * *.

'For the reasons I have indicated, I would make the right to introduce such evidence a requirement of due process in obscenity prosecutions' (id. pp. 167-167)."

Justice Harlan, after stating his agreement with Justice Frankfurter, added (pp. 171-172):

"The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—'using that term in its primary sense of an opportunity to be heard and to defend [a] * * * substantive right,' * * * requires a State to allow a litigant in some manner to introduce proof on this score. * * * *" (Emphasis supplied.)

As to the need to prove "scienter," in People v. Fritch (13 N. Y. 2d, 119), the court said, in dealing with a book which it held to be obscene (p. 126):

"There still remains for consideration and disposition the issue of scienter; for even though a publication is obscene, a conviction may not stand without proof of scienter on the part of those charged with a violation of section 1141 of the Penal Law."

Under the theory on which this case was tried, the "a priori" judgment of the trial judge that the book is "hard-core" pornography was accepted as final and conclusive and scienter was deduced from defendant's familiarity with the book without permitting him to show his personal familiarity with the subject of what had been legally adjudged pornographic.

Opinions of Court of Appeals

BREITEL, *J.*:

After judgment of conviction for violation of section 1141 of the Penal Law, and affirmance by the Appellate Term, one justice dissenting, defendant appeals. Defendant has paid the $250 fine imposed. The only issue of those raised by defendant's counsel on which there is stated disagreement in the Court is whether the subject publication is obscene under the statute.

Under the authoritative rules laid down by the courts, material that is offensive "focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably to sex, and to the human spirit' * * * it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty' " (*People* v. *Richmond County News*, 9 N Y 2d 578, 587). See, generally, *Roth* v. *United States* (354 U. S. 476, 488-489) for the prurient appeal test; and *Mishkin* v. *New York* (383 U. S. 502, 508) holding that "where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement * * * is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group". The new Penal Law provision not yet effective is interesting and valuable because the draftsmen sought to restate

the most recent decisional rules. Section 235.00 defines the obscene as

> "Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience." (Eff. September 1, 1967.)

Compare section 251.4 of the A.L.I. Model Penal Code.

The instant pamphlet consists of 70 pages with a centerleaf. Although styled *Grecian Guild Studio Quarterly*, and numbered, it is not clear that it is a periodical. The page dimensions are 8⅝ by 5¼ inches. The pamphlet contains 70 full page photographic reproductions including the covers. There is no text except for two pages of advertising data with reference to subscriptions for photographic prints, and the centerleaf containing advertising blurbs or "reviews" of two books, entitled "Kept Boy" and "Dial P for Pleasure". All of the photographs are of two or more young men, and in nearly all, in various stages of undress or nudity, engaged in attitudes of embracing, wrestling, spanking, beating, or enforced disrobing of one of the young men. In some of the pictures, the ones indeed which are most violative of the statute, one of the young men is hardly more than a boy. Where genitalia would be exposed the area is rendered opaque by retouching. A few of the captions are suggestive.

Two of the photographs portray one young man manually soap-lathering the genitalia of the other. One por-

trays a young man trying to seize the genitalia of another. Two portray the young men in embracive posture consonant with and suggestive of an act of pederasty. There are three nude spanking scenes. There are several others depicting sadistic assaults. The disrobing and wrestling scenes are strongly suggestive of activity directed toward exposure or seizure of genitalia. These photographs in the context of the others in the pamphlet indicate that the pamphlet taken as a whole is designed to portray a full range of sexual behavior between young males from by-play to pederasty.

While the photographs portray something of action sequences in intimate relationships they otherwise tell no narrative. No redeeming social values are apparent and defendant's able counsel makes no claim to such values in the material. (See *Roth* v. *United States*, 354 U. S. 476, 484, *supra*.) No freedom of expression is involved because no development of ideas is directly or indirectly suggested.

Applying the tests as laid down in *People* v. *Richmond County News* (*supra*, at 586-587), and so long as there is a constitutionally valid legislative policy to control the obscene, the pamphlet must be held obscene.

Finally, if there were still any doubt as to the motivation for the publication and the purpose of its appeal, the centerleaf advertising would make them utterly clear. Referring to one of the books advertised it states "Here is a book with something for everybody—everybody with any of the known perversions, that is—and if the author * * *". One of the chapters is described as containing "a long and precise lesson on how to perform fellatio properly", belonging in "a gay sex manual". This language, of course, does not refer to the photographs but is addressed to the same audience as the photographs in the pamphlet in question and is therefore part of the relevant context.

MANUAL *Enterprises* v. *Day* (370 U. S. 478) is of no help to defendant. The footnote description of the material by the government in that case was characterized by the court as inaccurate. Presumably, if the description had been accurate the case might have been decided differently. Moreover, the instant case does not involve portraits merely of made nudes comparable to acceptable portraits of female nudes or to acceptable portraits of male and female nudes together. Photographs of similar sexual activity between made and female, without social justification or excuse, would be equally obscene.

Accordingly, the order should be affirmed.

FULD, *Ch. J.* (dissenting):

I subscribe, of course, to the test employed by the majority in ascertaining whether material is obscene or pornographic under section 1141 of the Penal Law (Opinion, p.) [Mimeo., p. 1] but I cannot agree with the conclusion that, under that test, the magazine before us is obscene. (See *People* v. *Richmond County News,* 9 N Y 2d 578.)

If it were to be judged in terms of my personal views of its social value, of its moral and aesthetic worth, I would condemn it for its vulgarity and its tawdriness. However, I am concerned not with its artistic merit but, rather, with its constitutional status and, as I wrote in the *Richmond County News* case (9 N Y 2d, at p. 588), "Basic principles of jurisprudence * * * command us to put to one side all personal predelictions" and to appraise the challenged writings or pictures "as objectively as is possible in the light of First Amendment concepts." It is my belief that the majority, placing emphasis on the maga-

zine's lack of social value and moral worth, has mistakenly equated "offensiveness" with "prurient appeal" (*United States* v. *Klaw*, 350 F 2d 155, 167) and "hard core pornography". (*People* v. *Richmond County News*, 9 N Y 2d 578, 586, *supra.*)

The overdrawn descriptions contained in the majority opinion make the pictures of the male models in this magazine seem to be something other than merely "suggestive". But, in point of fact, there is neither indecent exposure nor portrayal of a consummated lewd act; indeed, the photographs are no worse than the magazine pictures of female models which we have previously held not to be pornographic. (See, e.g., *People* v. *Moran*, 15 N Y 2d 926, *Larkin* v. *G. I. Distributors*, 15 N Y 2d 869; *Metzger* v. *Couper*, 15 N Y 2d 802.) As Mr. Justice Harlan remarked in *Manual Enterprises* v. *Day* (370 U.S. 478)—which involved magazines containing pictures of nude male models, some being posed in pairs—"the most that can be said of [such magazines] is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene'" (p. 490, and see p. 489, n. 13; see, also, *Redrup* v. *New York*, 386 U.S. ; *One, Inc.* v. *Olsen*, 355 U. S. 371; *United States* v. *One Carton Positive Motion Pictures Film*, 367 F 2d 889; *United States* v. *Zindeveld*, 316 F 2d 873, 875-876, 881-882, cert. den. 376 U.S. 916.)

I would but add that, in affirming this conviction, the court is apparently assessing the magazine not with respect to its prurient appeal to the public at large but, rather, "in terms of the sexual interests of its intended and probable recipient group". (*Mishkin* v. *New York*, 383 U.S. 502, 509.) This is clearly improper as there is "no evidentiary basis [in the record] from which to 'recognize' an appeal to the prurient interest of the deviate or the typical recipient". (*United States* v. *Klaw*, 350 F 2d 155, 168, *supra.*) The First Amendment freedoms

of speech and press are too important and precious to be surrendered to "speculations and suspicions about the prurient appeal of material to some * * * undefined person whose psyche is not known". (*United States,* v. *Klaw,* 350 F 2d 155, 167, *supra.*)

In the view which I have taken, I find it unnecessary to consider the other arguments, also of constitutional dimension, which the defendant has advanced.

I would reverse the judgment and dismiss the information.

* * *

Judgment affirmed. Opinion by Breitel, *J.* All concur except Fuld, *Ch. J.,* who dissents and votes to reverse and to dismiss the information in an opinion.

Order of Court of Appeals Denying Motion for Reargument and Granting Motion Amending Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day July, A. D. 1967.

Present:

HON. STANLEY H. FULD, *Chief Judge, presiding.*

[SAME TITLE]

A motion for reargument or, in the alternative, to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether defendant-appellant's rights under the due process clause of the Fourteenth Amendment were violated. Defend-

ant argued that the material upon which the prosecution was based was not obscene, that there was a burden upon the People to produce evidence of contemporary community standards, and that it was necessary for the prosecution to prove that defendant had reason to believe that the material violated the law. The Court of Appeals held that the constitutional rights of defendant-appellant had not been violated.

And the Criminal Court of the City of New York, County of Queens, hereby is requested to direct its clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Gearson Kimball
Deputy Clerk

SUPREME COURT, U. S.

FILED

SEP 23 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 430

G. I. DISTRIBUTORS, INC.,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION	3
PERTINENT STATUTE	4
STATEMENT OF THE CASE	4
The Information	4
The Prosecution's Evidence at Trial	4
The Conviction	5
POINT ONE—The conclusion of the New York Court of Appeals that the record supported findings of obscenity and scienter is in conformity with the decisions of this Court	6
A. As to Obscenity	6
B. As to Scienter	13
CONCLUSION	15

TABLE OF AUTHORITIES

PAGE

Cases:

Garner v. Louisiana, 368 U. S. 157 (1961) 13
Ginzburgh v. United States, 383 U. S. 463 (1966) 11

Jacobellis v. Ohio, 378 U. S. 184 (1964) 12

Manual Enterprises v. Day, 370 U. S. 478 (1962) 10
Mishkin v. New York, 383 U. S. 502 (1966) 6, 7, 9, 10, 12, 13, 14, 15

People v. Finkelstein, 11 N Y 2d 300 (1962), *cert. den. sub nom. Finkelstei nv. New York,* 371 U. S. 863 (1962) 14, 15
People v. G. I. Distributors, Inc., at 20 N Y 2d 104 1
People v. Richmond County News, 9 N Y 2d 578 (1961) 6, 8, 10, 12

Roth v. United States, 354 U. S. 476 (1957) 6, 7, 8, 9, 11, 12, 13

Smith v. California, 361 U. S. 147 (1959) 13, 14

Other Authorities:

United States Constitution
Amendment I 3
Amendment XIV, Section 1 3

New York Penal Law, Section 1141 4

18 U.S.C., §1461 11

28 U.S.C.A., §1257 (3) 2

IX Wigmore on Evidence, §2572 (3d ed. 1940) 13

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No. 430

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BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

Opinions Below

The opinions of the New York Court of Appeals (majority and dissenting) is reported *sub nom. People* v. *G. I. Distributors, Inc.*, at 20 N Y 2d 104. The Appellate Term of the New York Supreme Court, Second Judicial Department—the intermediate appellate court—did not write an

opinion; however, there was a dissenting opinion which has not been reported but is printed as an appendix to the petition at pp. 15-17. The Criminal Court of the City of New York, County of Queens, wrote no opinion.

Jurisdiction

This petition for a writ of certiorari to the Court of Appeals of the State of New York seeks review, pursuant to the provisions of 28 U.S.C.A., §1257 (3), of an order of that court entered June 1, 1967, affirming by a divided vote (FULD, Ch.J., dissenting) in an opinion by BREITEL, J., an order of the Appellate Term of the New York Supreme Court, Second Judicial Department, entered December 30, 1966, which had affirmed by a divided vote (GULOTTA, J., dissenting), a judgment of the Criminal Court of the City of New York (TOLLERIS, P.J.; WEINFELD and O'NEILL, JJ.), County of Queens, rendered June 3, 1966, convicting the petitioner, after trial, of a violation of Section 1141 of the New York Penal Law (OBSCENE PRINTS AND ARTICLES) and imposing a fine of two hundred and fifty dollars (6-7, 23-4, 27-31).*

On July 7, 1967, the New York Court of Appeals denied a motion by petitioner, insofar as it sought reargument but granted it to the extent of amending its remittitur to provide that:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether defendant-

* References, unless otherwise indicated, refer to pages of the Record on Appeal filed in the New York Court of Appeals.

appellant's rights under the due process clause of the Fourteenth Amendment were violated. Defendant argued that the material upon which the prosecution was based was not obscene, that there was a burden upon the People to produce evidence of contemporary community standards, and that it was necessary for the prosecution to prove that defendant had reason to believe that the material violated the law. The Court of Appeals held that the constitutional rights of defendant-appellant had not been violated."

Pertinent Provisions of the United States Constitution

Amendment I of the United States Constitution reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV, Section 1 of the United States Constitution reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent Statute

The relevant portions of Section 1141 of the New York Penal Law, upon which the informations are based, read as follows:

> "A person who * * * has in his possession with intent to sell, lend, distribute, give away, show or transmute * * * any obscene * * * book * * * [i]s guilty of a misdemeanor * * *"

Statement of the Case

The Information

By information filed in the Criminal Court of the City of New York, Queens County, by the District Attorney of that county on November 10, 1965, the petitioner was accused of unlawfully possessing with intent to sell a quantity of obscene books (6). At the commencement of the trial, the information was amended upon consent of all parties to specify the names of the books in question (9-10). The books thus specified were "Grecian Guild Studio Quarterly No. 15," "Gay Reunion" and "The Innocent Lesbian" (10).

The Prosecution's Evidence at Trial

Patrolman **William Farberman** of the New York City Police Department testified that, at about 2:00 p.m., on September 29, 1965, he visited petitioner corporation's premises.

The witness informed a Mr. Herman, president of petioner corporation, that he was a police officer, displayed a search warrant (Exhibit 1), and told Mr. Herman that he

"had come to search for pornographic material" (12). Mr. Herman replied that "he had no pornographic material" (12). Upon the officer's showing Mr. Herman copies of "The Innocent Lesbian," "The Gay Reunion," and "Grecian Guild Studio Quarterly No. 15" (Exhibits 2-4) and stating that the books are pornographic in the opinion of the Police Department's legal bureau, the latter stated "These are not pornographic" (12-13). The officer then asked if Mr. Herman had copies of the book in stock, and was advised "Yes, we have some. We will go to the warehouse and find them, we will look for them" (13). Search of the petitioner corporation's warehouse disclosed 478 copies of "The Innocent Lesbian" (Exhibit 2) and 1735 copies of "Grecian Guild Studio Quarterly No. 15" (Exhibit 4) (13-14). No copies of "Gay Reunion" (Exhibit 3) were found (14).

The Conviction

The trial court, during the trial, dismissed the charge concerning "Gay Reunion" (Exhibit 3) because copies of that book had not been found on petitioner's premises (14-15). The petitioner was found guilty of the charge relating to "Grecian Studio Quarterly No. 15" (Exhibit 4) but acquitted on the charge relating to "The Innocent Lesbian" (Exhibit 2).

POINT ONE

The conclusion of the New York Court of Appeals that the record supported findings of obscenity and scienter is in conformity with the decisions of this Court.

A. As to Obscenity

In determining that the book entitled "Grecian Guild Studio Quarterly" is obscene, the New York Court of Appeals did so with reference to principles laid down in this Court's decisions in *Roth* v. *United States*, 354 U. S. 476, 488-9 (1954) and *Mishkin* v. *New York*, 383 U. S. 502, 508 (1966) and in its own decision in *People* v. *Richmond County News*, 9 N Y 2d 578, 587 (1961).

This Court held in *Roth* that obscene material—matter dealing "with sex in a manner appealing to prurient interest"—was without the protection of the First Amendment of the United States Constitution (354 U. S. 476, 481, 487). It further held that the test to be utilized in determining obscenity is "whether to the average person, applying community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (*id.*, at p. 489).

The New York Court of Appeals in *Richmond County News* declared that this Court in *Roth* was charting only "the broad boundaries of any permissible definition of obscenity under the United States Constitution" but was not giving "specific content to the meaning of 'obscene' as it appears in * * * [the New York] statute" (9 N Y 2d 578,

585-586). The New York Court declared that the strictures of the New York obscenity statute (N. Y. Penal Law, §1141) "should apply only to what may properly be termed 'hard core pornography'" (*id.*, at p. 586). It then stated (*id.*, at p. 586-587):

> "As the Supreme Court observed in the *Roth* case (354 U. S. 476, 487, *supra*), 'sex and obscenity are not synonymous.' (See, also, *Mounce* v. *United States*, 355 U. S. 180, revg. 247 F. 2d 148; *One, Inc.* v. *Olesen*, 355 U. S. 371, revg. 241 F. 2d 772; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372, revg. 249 F. 2d 114.) Under our statute, section 1141 of the Penal Law, the test of the obscene, of the pornographic, is not in the tendency or appeal of the material, but rather in its content objectively appraised. (See Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 58-68.) It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Lawrence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'. (Murray, Literature and Censorship, 14 Books on Trial 393, 394; see also, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 65.)"

In *Mishkin*, this Court had occasion to comment on its prior decision in *Roth* and upon the New York Court of

Appeals decision in *Richmond County News*. Concerning the "average person" element of the *Roth* definition of obscenity, it was stated that (383 U. S. 502, 508):

> "Where the material is designed primarily for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."

As to the New York definition of obscenity enunciated in *Richmond County News*, this Court declared (383 U. S. 502, 508):

> "The New York courts have interpreted obscenity in §1141 [of the New York Penal Law] to cover only so-called 'hard-core pornography,' see *People* v. *Richmond County News, Inc.*, 9 N Y 2d 578 * * * Since that definition of obscenity is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below."

Viewing the book here in issue in its entirety [*Roth* v. *United States*, 354 U. S. 476, 489-490 (1957)], there can be no question but that it constitutes "hard-core pornography" and is, therefore, obscene [*People* v. *Richmond County News*, 9 N.Y.2d 578, 586 (1961)]. "Grecian Guild Studio Quarterly" is a soft-covered book of approximately sixty pages with a dollar price tag. It contains on practically every page photographs of nude men in various activities. Some of these photographs show men wrestling with one another with one of the contenders pulling down the other's shorts or ripping the other's clothes; others

depict a nude male being whipped; one depicts a nude male fondling the private parts of a nude young boy; another shows the nude young boy fondling the private parts of the nude adult male; and yet another depicts a nude adult male apparently sodomizing a nude young boy.

Furthermore, as the New York Court of Appeals noted (20 N Y 2d 104, 107):

> "Finally, if there were still any doubt as to the motivation for the publication and the purpose of its appeal, the centerleaf advertising would make them utterly clear. Referring to one of the books advertised it states 'Here is a book with something for everybody —everybody with any of the known perversions, that is—and if the author'. One of the chapters is described as containing 'a long and precise lesson on how to perform fellatio properly', belonging in 'a gay sex manual'. This language, of course, does not refer to the photographs but is addressed to the same audience as the photographs in the pamphlet in question and is therefore part of the relevant context."

In this connection, the petitioner declares "We do not see how the finding of obscenity in the case at bar can stand in view of this Court's decision in *Redrup* * * * [v. *New York,* 386 U. S. 767 (1967)], and the dozen or so cases decided on June 12, 1967" (Petition, p. 12). However the rationale of *Redrup* may be viewed, it is respectfully submitted that, since as demonstrated, the finding of obscenity in the case at bar is consistent with the decisions of this Court in *Roth* v. *United States,* 354 U. S. 476 (1957) and in *Mishkin* v. *New York,* 383 U. S. 502 (1966), there is no basis warranting this Court's review of this case.

Finally, in this same connection the petitioner's contention (Petition, p. 12), that "the question of the extent to which material appealing to homosexuals is protected should be settled by this Court" lacks merit. The precise question herein posited by petitioner was settled by this Court in its recent decision of *Mishkin* v. *New York,* 383 U. S. 502 (1966) wherein, as already noted (*supra,* p. 8), it was stated that (383 U. S., *supra,* p. 508):

> "Where the material is designed primarily for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."

The petitioner further claims that the prosecutor in an obscenity case must prove "the limits of candor in the Nation as a whole" otherwise no finding can be made that the book here in issue "goes substantially beyond customary limits of candor in description or representation of such matters" and is, therefore, obscene (Petition, pp. 6-10).

This contention, however, is belied by several of the decisions of this Court.

To begin with, in *Manual Enterprises* v. *Day,* 370 U. S. 478, 487 (1962), this Court characterized the issue of obscenity as one "* * * involving factual matters entangled in a constitutional claim." Speaking in the same vein, the New York Court of Appeals in *People* v. *Richmond County News,* 9 N Y 2d, *supra,* at 581, noted that:

> "It [obscenity] involves not a simple question of fact, but a mixed question of fact and constitutional law, calling upon the court to make an appraisal of a publication and its contents against the requirements embodied in both State and Federal Constitutions (N. Y. Const., art. I, §8; U. S. Const., 1st and 14th Amdts.)."

This Court, moreover, in *Ginzburg* v. *United States,* 383 U. S. 463 (1966) had occasion to comment on this point. In that case, a prosecution under the federal obscenity statute (18 U.S.C. §1461), the Court noted that the question there involved was whether the trial court had properly applied the standards for determining obscenity laid down in *Roth* v. *United States,* 354 U. S. 476 (1957) and stated (*Ginzburg* v. *United States, supra,* at 464):

> "In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise."

Since the Court has "* * * regarded the materials as sufficient in themselves for the determination of the question * * *" of obscenity, it is quite clear that affirmative proof of community standards is not mandated. That be-

ing so, determination of obscenity consists simply in analyzing the purportedly obscene material in the light of the *Roth* standards without more. As the Court noted, the only exception to this method of analysis is where the prosecution, as in *Ginzburg,* charges the offense of obscenity in the context of the circumstances of production, sale and publicity and assumes that the material when considered alone and apart from the aforementioned circumstances may not be obscene. That, however, is not the situation here. Recourse to the circumstances just mentioned is unnecessary for, as demonstrated, the book "standing alone" is obscene.

In this connection, the defendant cites *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964), for the proposition that national, not local standards must be applied in obscenity cases. Its citation of *Jacobellis* for the proposition espoused is correct.

A determination by the New York Court of Appeals that the book constitutes "hard-core pornography" and is therefore obscene as that term is defined in *People* v. *Richmond County News,* 9 N.Y. 2d 578, 586 (1961) and *People* v. *Fritch,* 13 N.Y.2d 713 (1963) is not violative of the "national test" doctrine of *Jacobellis.* In *Mishkin* v. *New York,* 383 U. S. 502, 508, this Court commented on the New York "hard-core pornography" test in the following language:

> "'The New York courts have interpreted obscenity in §1141 to cover only so-called 'hard-core pornography,' see People v. Richmond County News, Inc., 9 N.Y.2d 578, 586, 587, 175 N.E.2d 681, 685, 686 (1961),

> quoted in note 4, supra. Since that definition of obscenity is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below."

Since the test of obscenity by virtue of *Richmond County News* is stricter than that mandated by *Roth*, the "national test" doctrine has been satisfied.

It is noted that the petitioner, in substance, complains that "First Amendment protections" are here endangered by the New York Court of Appeals having taken judicial notice of the national standard of candor (Petition, p. 9). From what has been demonstrated, what the Court of Appeals judicially noticed was a rule or standard of law, *viz.*, the *Roth-Richmond County News* definition of obscenity which is an entirely proper use of the doctrine of judicial notice [see IX Wigmore on Evidence, §2572, pp. 551-554 (3d ed. 1940)]. The petitioner's citation of *Garner* v. *Louisiana*, 368 U. S. 157 (1961) is inapposite (Petition, p. 9). There this Court refused to judicially notice the purported fact that the presence of a Negro at a racially segregated lunch counter in Louisiana might cause a disturbance. That situation is quite distinct from the case at bar, where a rule of law, not a set of facts, was judicially noticed.

B. As to Scienter

In *Smith* v. *California*, 361 U. S. 147 (1959), this Court held that a Los Angeles obscenity ordinance was violative of the First Amendment to the United States Constitution because the statute—both on its face and as interpreted by the California courts—did not include scienter as an ingredient of the crime defined therein. Thereafter, the

New York Court of Appeals held that scienter was an element of the crime defined by the New York obscenity statute (Penal Law, §1141) and that, accordingly, the statute was constitutional [*People* v. *Finkelstein,* 11 N Y 2d 300 (1962), *cert. den. sub nom. Finkelstein* v. *New York,* 371 U. S. 863 (1962); and see *Mishkin* v. *New York,* 383 U. S. 502 (1966)].

The petitioner contends that scienter means "not only that the accused knew what kind of material was involved but also that he had reason to believe the material violated the law" (Petition, p. 12). This contention lacks merit.

In *People* v. *Finkelstein,* 11 N. Y. 2d 300 (1962), *cert. den.* 371 U. S. 863 (1962), the New York Court of Appeals citing *Smith* v. *California,* 361 U. S. 147, 149 (1959), defined scienter as "knowledge by * * * [defendants] of the contents of the book[s]." This Court in *Mishkin* v. *New York,* 383 U. S. 502, 511 (1966), noted that the Court of Appeals, in the earlier *Finkelstein* case, had defined scienter in the following language (9 N.Y.2d 342):

> "A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised * * *."

This Court then noted (383 U. S., *supra,* at 511, footnote 9) that the definition in the second *Finkelstein* case was not a modification of that set forth in the first *Finkelstein* case. Accordingly, scienter—insofar as obscenity cases are concerned—means knowledge of the contents of the material in issue.

Here, there was ample proof that the defendant, through its president, had knowledge of the contents of the book (*cf.*, petition, pp. 10-12). The president's declarations to the police officer that the book was not pornographic (12, 13) was an opinion based on familiarity with the subject matter of the book in issue [see *People* v. *Finkelstein,* 11 N.Y.2d 300, 303-304 (1962); *Mishkin* v. *New York,* 383 U. S. 502, 511 (1966)]. Moreover, the photograph on the front cover of the book with the dollar price tag further buttresses the conclusion of the defendant's knowledge [see *People* v. *Finkelstein,* 11 N.Y.2d, *supra,* at pp. 303-304; *Mishkin* v. *New York,* 383 U. S., *supra,* at 511].

In view of the foregoing, it is respectfully submitted that the conclusion of the New York Court of Appeals that the record supported findings of obscenity and scienter is in conformity with the decisions of this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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District Attorney
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Of Counsel

September, 1967